NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1432

STATE OF LOUISIANA

VERSUS

RYAN NELSON SANDT

Judgment Rendered: March 23, 2007

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On Appeal from the Thirty-Second Judicial District Court
In and For the Parish of Terrebonne
State of Louisiana
Docket Nos. 423,152 and 452,917

Honorable Randall L. Bethancourt, Judge Presiding

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Ellen Daigle Doskey
Jay Luke
Assistant District Attorneys
Houma, LA

Counsel for Appellee
State of Louisiana

Bertha M. Hillman
Thibodaux, LA

Counsel for Defendant/Appellant
Ryan Nelson Sandt

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Ryan Nelson Sandt, was charged by bill of information with aggravated battery,[1] a violation of LSA-R.S. 14:34. He pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant filed motions for new trial and post verdict judgment of acquittal, which were denied. The defendant was sentenced to "[s]ix months DOC" and ordered to pay a $1,000.00 fine and restitution in the amount of $662.96. The state filed a habitual offender bill of information. Following a hearing, the defendant was adjudicated a second felony offender pursuant to LSA-R.S. 15:529.1. The defendant's original aggravated battery sentence was vacated, and the defendant was sentenced, as a second felony offender, to five (5) years, "without hard labor, with the Department of Corrections," and without benefit of probation or suspension of sentence. The trial court also ordered that two years of the sentence may be served through home incarceration, and that the defendant pay a $1,000.00 fine and $662.96 in restitution. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating one assignment of error based on the insufficiency of the evidence. We affirm the conviction and habitual offender adjudication. However, we vacate the sentence and remand for re-sentencing.

FACTS

On or about December 6, 2003, around midnight, Ken Crossland and his wife, Laura, along with Charles James and his girlfriend, Debbie Robinson, went to Sherry D's in Houma, Terrebonne Parish. Shortly after Ken entered the bar, Ken and the defendant engaged in a brief verbal confrontation over football. The defendant was with his girlfriend, Melissa

[1] The charge on the bill of information was amended from aggravated second degree battery to aggravated battery.

Naquin, defendant's brother, Alfred Mataya, and their friend, Rodney Marcel, Jr. (the "group").[2]

James testified at trial that when the heated exchange ended between Ken and the defendant, they shook hands and separated. Later on, when Laura and Robinson were dancing, Laura fell and hit her head on the pool table and the floor. Ken and Laura went outside. When James realized that Ken and Laura were not in the bar, he went outside to check on them. In front of the bar, James saw the group by Ken and Laura. As James approached, he heard Ken say "leave us alone." Ken had no weapon and made no threats toward the defendant. James then saw the defendant throw a beer bottle at Ken, which struck him in the head. The defendant rushed Ken. The defendant and Ken grabbed each other, fell to the ground, and began fighting. Moments later, a Louisiana State Trooper arrived and broke up the fight.[3] Subsequently, deputies from the Sheriff's Department arrived, and James gave a written statement to the police.

Ken testified that after his wife fell, Mataya approached him and said, "Dude, your old lady's on the ground." Ken helped up Laura, who said she wanted to go outside. After about five minutes outside, Laura said she

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[2] There was conflicting testimony as to what transpired when Ken entered the bar. James testified that Ken and the defendant began arguing over LSU and Alabama football. Ken and Laura testified that Ken was wearing an Alabama shirt. When the group saw his shirt, they said "Alabama sucks." Ken said, "LSU sucks." After a brief argument, they shook hands. Mataya testified that Ken saw the group and called them "young punks." Mataya and Ken exchanged words. The defendant got between them, and Mataya and Ken went their separate ways. Marcel testified that Ken was "pretty intoxicated" and came in the bar "with this bad attitude." Ken was "whooping and hollering" and got in Mataya's face and then the defendant's face. Naquin testified that when Ken walked in the bar, "they seemed really drunk." Ken was hollering about Alabama and that "LSU sucks." She then remembered seeing the defendant get between Ken and Mataya, who looked like they were about to fight. The defendant testified that Ken came in the bar "running his head about a football game." Mataya and Ken began arguing, and the defendant stepped in between them.

[3] State Trooper Michael Stewart testified that, while he was on duty, he saw Ken and the defendant involved in an altercation. While they were grappling on the ground, Trooper Stewart observed a female striking "into the group" with her feet. He broke up the fight and detained three male subjects.

wanted to go home. Ken and Laura began walking home. They were about twenty feet from the bar door when Ken heard the defendant say, "Hey, dude, you need to take care of your old lady." Ken told the defendant it was none of his business and to leave them alone. The defendant said, "What, you want some of me?" At that moment, Ken saw a "flash." He ducked and when he came up, his face was bloody. The defendant was in front of Ken, so Ken grabbed him and took him to the ground. Ken said, "Here, you want some blood?" Ken did not swing at the defendant, but just let his blood drip on him. Ken testified that he did not threaten anyone, charge anyone, or pull a weapon, and that the only person that he had any physical confrontation with was the defendant. Ken was taken to the hospital by ambulance, where he received fifteen stitches above his right eye. During the following cross-examination, Ken indicated that he did not see the defendant throw the beer bottle:

> Q. Okay. Is it your testimony that you didn't see Sandt throw anything at you?
> A. It happened so quick, I just seen [sic] the flash. But it came from his direction.
> Q. But that's your testimony, you didn't see -- you did not see Sandt throw anything at you.
> A. I didn't physically see him do it, no.

Laura testified that she was dancing with Robinson when she slipped and fell. She hit her head on the pool table and the floor. After she and Ken went outside, they decided to walk home. As they began walking, several people, including the defendant and Naquin, approached them. Ken told them to leave him and Laura alone. The defendant yelled, "What bra? You want a piece of me? You want a piece of me?" Ken at no time pulled out a weapon. Laura then heard a crash. Beer "went all over" her. She looked up and Ken's eye was gashed wide open. Ken and the defendant then "went to

the ground." While they were on the ground fighting, Naquin kicked Ken in the side. Shortly afterward, a police officer arrived.

Laura did not see who threw the bottle at Ken. Laura testified that Ken did not have an altercation with a female outside. When asked if a female came outside at any time to see if she (Laura) was "okay," Laura responded, "No, sir." When asked if any male who was outside asked her (Laura) if she was "okay," Laura responded, "No, sir."

Bobby Folse, a deputy sheriff at the time of the incident, testified that, when he arrived on the scene, there were three male subjects handcuffed.[4] Deputy Folse **Mirandized** the defendant and obtained a verbal statement from him. When asked what the defendant said, Deputy Folse testified as follows:

> He told me that they were inside Sherry D's; they were talking about their favorite football teams; and a female, who was later identified as Laura, fell a couple of times in the bar. And that she left and another female followed her. He said that him and his brother had walked out to check on Laura, and a male subject, who was later identified as Kenneth, got mad because they said, "Are you okay, Baby?" They said that Kenneth started arguing -- yelling and arguing at them -- with him; and right before -- well, at that point he said he went off. I asked him what he meant by "he went off" [sic], and he said that he hit him. I asked him what did he hit him with, and he answered, "Whatever I had in my hand." At that point[,] I asked him if he had a beer bottle in his hand, and he said, "Yes." Then I asked him if he hit Kenneth with the beer bottle, and he said, "Yes." The only other question I asked him was -- at that time was if there was a female subject with him, and he wouldn't answer that. I asked him if he would provide me with a written statement, and he said he'd rather not.

The defendant and Mataya were arrested. Mataya was charged with disturbing the peace by fighting and disturbing the peace by loud and abusive language. Ken was issued a written summons for disturbing the peace by fighting.

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[4] The subjects were the defendant, Mataya, and Ken.

Mataya testified that, following Ken's initial encounter in the bar with Mataya and the defendant, Ken sat at the other end of the bar and continued discussing football. Ken and the defendant engaged in a heated argument. As Laura approached Ken, he threw his hands back while arguing and hit Laura in her shoulder.[5] Laura lost her balance, fell, hit her head on the pool table, and was knocked out. When Laura regained consciousness, Naquin asked if they needed a ride home. Ken and Laura declined the offer and went outside. Naquin went outside to ask again if they needed a ride. Mataya looked out of the bar door and saw Ken push Naquin twice. In response, Naquin hit Ken in the head with a beer bottle.

Mataya further testified that he walked toward them to stop the fight. The defendant came out of the bar, ran past Mataya, who thinks he told the defendant "smoke him . . . ." After a few words were exchanged, Ken and the defendant began fighting. Mataya and the defendant both had beer bottles in their hands when they left the bar, but Mataya testified that they threw them on the ground before fighting. While Ken and the defendant were fighting, James ran up. It appeared that James was about to kick the defendant, so Mataya struck James twice. Mataya testified that the defendant did not assault Ken with a bottle or a weapon and that the only thing defendant used on Ken were his fists. Mataya also testified that he did not see Laura dancing.

Marcel testified that, while he heard Laura fall, he did not see what caused her to fall. When asked if Robinson and Laura were dancing on the

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[5] The alleged hit appeared to be accidental. On redirect examination, Mataya testified as follows:

> Yes. . . . I mean Kenneth and Ryan was [sic]arguing about the football game. She walked up from where they were sitting. He threw his hands back, you know it wasn't no real fighting over [sic], nothing like that, but he just kind of threw his arms back in the middle of a conversation, it hit her, I think on the shoulder if I'm not mistaken, looked around her shoulder area, and she lost her balance, kind of toppled over, hit her head.

floor together at some point, Marcel responded, "No." When Laura was helped up, Naquin offered her a ride home. Ken, Laura, Naquin, and Mataya walked outside at the same time. Later, Marcel and the defendant walked out of the bar together. Marcel saw Naquin and Mataya standing by Ken and Laura. The defendant approached and got behind Naquin. Naquin took two steps back, then two steps forward, and hit Ken in the head with a beer bottle. Ken charged the defendant, and they began fighting. While Ken and the defendant were fighting, Naquin punched and kicked Ken. The following testimony by Marcel suggests that he did not witness Ken push Naquin:

> Q. Did Melissa ever tell you at any time period why she hit the man with a beer bottle?
> A. What she said, he pushed her.
> Q. Did you see anything like that?
> A. I mean for Melissa to take two steps back it's for a reason.
> Q. Did you see her do anything is what I'm asking?
> A. No.

Naquin testified that she saw Laura fall, but did not know what caused her to fall. When Laura got up, Ken told her to walk home. Laura walked out of the bar, and Naquin followed Laura and offered her a ride.[6] As they were talking, Ken approached them, cursed at Naquin and pushed her. Naquin explained that she was just trying to get Laura home and did not want to see anything happen to her. Ken cursed some more and pushed Naquin again. Naquin had a beer bottle in her hand. She swung the bottle and hit Ken in the facial area. The next thing that Naquin remembered was that Ken and the defendant were fighting. While Ken and the defendant were on the ground fighting, Naquin kicked Ken. When the police pulled

[6] On cross-examination, Naquin was asked if Ken walked out with Laura after he told her to go home. Naquin responded, "I'm not sure. I saw her walk out I mean. I'm not sure who else walked out, you know, but I mean I went out and I offered her a ride."

up, Naquin went into the bar bathroom to get blood off her sleeve. She stayed in the bathroom for a while and then left the bar.

Later, when Naquin got home, she received a phone call from the defendant's mother, who was working at Sherry D's that night. The defendant's mother told Naquin that the defendant was in jail charged with aggravated battery. Naquin testified that because she, not the defendant, was the one who hit Ken with a beer bottle, she called the Sheriff's Office and explained what happened. Naquin was subsequently arrested. Naquin testified that she pled not guilty to a charge of aggravated battery. The next time she went to court, however, the charge was disturbing the peace by fighting, to which she pled guilty.[7] Prior to this, Naquin had never been convicted of any crime.

Sally Carney testified that she is a bartender and assistant manager at Sherry D's. She knew everyone involved in the incident. She was not at the bar the night of the incident, but spoke to Ken about what happened. According to Sally, Ken told her that the defendant was not the one who hit Ken with the beer bottle because the defendant was standing in front of Ken, and the bottle came from the side or the back.

The defendant testified that he had felony convictions for two counts of simple burglary. The defendant did not see how Laura fell. When he noticed that Naquin was not in the bar, he went outside with Marcel to look for her. He saw Naquin, Mataya, Ken, and Laura standing in the parking lot. As the defendant approached, he saw Naquin take a couple of steps back.

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[7] It is not clear from the record that Naquin pled not guilty to an aggravated battery charge. In the record, there is a criminal bond, which indicates that Naquin was arrested for the crimes of one count of disturbing the peace by fighting and one count of aggravated second degree battery. The bill of information indicates that Naquin was charged only with disturbing the peace by fighting. A minute entry, however, indicates that Naquin, upon being re-arraigned, entered a plea of guilty to the charge of disturbing the peace by fighting.

Defendant testified that Mataya told the defendant that Ken just pushed Naquin. In defending Naquin, the defendant fought with Ken. The defendant denied that he hit Ken with a bottle. The defendant had a beer bottle in his hand when he walked out of the bar, but dropped the bottle as he approached Ken. The defendant did not remember telling Officer Folse that he hit Ken with a beer bottle. On direct examination, the defendant did not testify that he saw Naquin throw the beer bottle. On cross-examination, while the issue of who threw the bottle was addressed, the defendant's testimony is unclear on whether he actually witnessed Naquin throw the bottle. In one instance, the following colloquy took place:

> Q. Did you hear your girlfriend say that she went ahead and took a bottle and knocked the hell out of him, and he was bleeding prior to you getting involved in the incident? Did you hear her say that? Is she wrong?
> A. Man, --
> Mr. Yates [defense counsel]: Your Honor, he's asking three or four questions at a time. If he would ask one question at a time, it might help.
> The Court: Try that.
> Q. Did you hear your girl friend [sic] say she hit the man with a bottle and he was bleeding?
> A. You don't understand how quick this happened.
> Q. Answer the question.
> A. Yes, she did. It happened so quick. By the time I got to swing another swing, this man was already cut and covered with beer. I mean that quick. If you can imagine how quick that is, you'd understand.

In another instance, the following colloquy took place:

> Q. Did she say anything that she went and she was pushed by this fellow?
> A. Yes, she did.
> Q. Did she get up here and say she hit the fellow with --
> A. I was --
> Q. -- the beer bottle?
> A. My brother -- my brother told me this after.
> * * * * *
> Q. All right. Did she get up here and say anything about hitting the fellow with the beer bottle?
> A. What [were] you talking about, before? I mean I didn't even know what the hell was going on. . . . I mean I come

outside, I see my old lady -- my girlfriend take a couple steps back and -- like she had been jarred from a push. My brother is over there a couple feet away saying that this man just pushed my girlfriend. I mean other than that, blind rage.
Q. So after your girlfriend was pushed back, she never went back towards him. You were right there.
A. By the time I got out there it was on the second push, from what I understand.
Q. Okay. And when you got up here and you [were] watching this incident occur, I think your girlfriend would be to your right when you were coming out?
A. No -- well, whenever you [are] coming out, yeah, it's off to the right, but once I turned that way they were directly in front of me.
Q. That's what I mean. I mean -- the fight was directly in front of you, but you could see Kenneth and you could see your wife at the same time?
A. Pretty much, they was [sic] over offset.
Q. Yeah. And your wife was pushed, and you saw her take two steps back, and you were -- (Mr. Luke [prosecutor] clapped his hands together) -- you were right there right on top of it.
A. Not that -- quite that quick, but I wasn't -- didn't take me too long to get there.
Q. And you didn't see any swing your wife made or anything; she got pushed, and that's what made you mad.
A. Yes.
Q. Did you or any of your friends tell the police that part of the story that we just went over?
A. Just like I told you, the cops didn't really talk to me, as far as I know, other than if I was all right. The only other statement that was made was by my girlfriend whenever she turned herself in.
Q. And she indicated that she was pushed, and she hit the fellow with a bottle.
A. Yes.
Q. That's what she told the police.
A. I mean I found out all the events pretty much throughout coming to court and everything, you know. I didn't know exactly what was going on. I had to inquire myself.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence was insufficient to support the conviction. Specifically, the defendant contends that the state failed to prove that he committed aggravated battery, namely that he was the one who threw the beer bottle.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La.1988). The **Jackson v. Virginia** standard of review, incorporated in article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

A battery is the "intentional use of force or violence upon the person of another . . . ." LSA-R.S. 14:33. An aggravated battery is a "battery committed with a dangerous weapon." LSA-R.S. 14:34. "'Dangerous weapon' includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." LSA-R.S. 14:2(3). However, aggravated battery requires neither the infliction of serious bodily harm nor the intent to inflict serious injury. Instead, the requisite intent element is general criminal intent. **State v. Howard**, 94-0023, p. 3 (La. 6/3/94), 638 So.2d 216, 217 (per curiam). Criminal intent is addressed in LSA-R.S. 14:10(2), which provides as follows:

> General criminal intent is present whenever there is

> specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts that have been declared criminal. See **State v. Brown**, 2000-1951, p. 3 (La.App. 1 Cir. 5/11/01), 808 So.2d 622, 623-24.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La.App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La.1984). The defendant's hypothesis of innocence was based on the theory that he was not the person who threw the beer bottle at Ken's face.

The testimony elicited at trial established that someone struck Ken above his right eye with a beer bottle, either by direct contact or by throwing it. Ken's injury required fifteen stitches. According to the testimony, either the defendant or Naquin struck Ken with the beer bottle. James testified that

he specifically saw the defendant throw the beer bottle at Ken. Deputy Folse testified that the defendant said that he hit Ken with a beer bottle. Other witnesses testified that they did not see who threw the beer bottle. The defendant denied that he struck Ken with a beer bottle. Naquin testified that she was the one who struck Ken with a beer bottle. Mataya and Marcel also testified that Naquin struck Ken with a beer bottle. Given the conflicting testimony adduced at trial on this issue, it would seem that all of the witnesses could not have been completely truthful or were mistaken about what actually occurred. The decision of the jury clearly came down to the question of credibility.

It is obvious from the finding of guilt that the jury concluded that the testimony of James, an eyewitness, Officer Folse, Ken, and Laura was credible and reliable enough to establish the defendant's guilt. In finding the defendant guilty, it is clear that the jury rejected some or all of the testimony of the defendant, Mataya, Marcel, Naquin, and Carney, and thereby rejected the defendant's hypothesis of innocence. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La.App. 1 Cir. 1985). We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of aggravated battery.

The assignment of error is without merit.

REVIEW FOR ERROR

In reviewing the record for error under LSA-C.Cr.P. art. 920(2), we have discovered a sentencing error that requires a remand for re-sentencing. Whoever commits an aggravated battery shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than ten years, or both. LSA-R.S. 14:34. The trial court erred when it sentenced the defendant as a second felony habitual offender to five years "without hard labor, with the Department of Corrections of the State of Louisiana." A sentence to the Department of Corrections is necessarily a sentence at hard labor. See LSA- R.S. 15:824(C). Thus, if the defendant is remanded to the custody of the Department of Corrections, his sentence must be at hard labor. However, if the defendant's sentence is to be without hard labor, he is not to be remanded to the custody of the Department of Corrections. See LSA-R.S. 15:565 & 15:566(B). As the defendant's sentence can be with or without hard labor under LSA-R.S. 14:34, and the trial court's intent in sentencing the defendant cannot be ascertained from this record, we must vacate the sentence and remand for resentencing.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED. SENTENCE VACATED AND REMANDED FOR RESENTENCING IN ACCORDANCE WITH THIS OPINION.